A **CENTRAL COLDSTORAGE KUCHING SDN BHD**

v.

KETUA PENGARAH HASIL DALAM NEGERI

B HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[JUDICIAL REVIEW NO: JR-1-2010-I]
5 MAY 2010

C ***ADMINISTRATIVE LAW:*** *Remedies - Certiorari - Application to quash respondent's notices of additional assessment - Whether respondent lacked jurisdiction or statutory power to issue additional notices - Whether arguable case disclosed - Rules of the High Court 1980, O. 53 r. 3*

D This was an application for leave to apply for an order of *certiorari* to quash the respondent's three Notices of Additional Assessment issued under the provisions of the Income Tax Act 1967 in respect of the year of assessment 2004, 2005 and 2006 pursuant to O. 53 r. 3 of the Rules of the High Court 1980. The applicant also
E sought to stay the operation of the said three Notices of Additional Assessment. The applicant had been granted Investment Tax Allowance (ITA) under s. 27 of the Promotion of Investments Act 1986 for the approved activity of 'processed poultry products'. The applicant argued that by imposing additional assessments after the
F audit exercise, the respondent had in effect withdrawn the ITA and this was illegal according to the applicant because only the Minister of International Trade and Industry (MITI) had the power to revoke the ITA under s. 28. The respondent, however, contended that it did not withdraw the ITA and submitted that the audit exercised
G revealed that the applicant was not carrying out the approved activity of processing poultry products such as 'burgers, nuggets, fritters etc' and was only producing 'whole chicken and chicken parts.' It was for this reason that the respondent determined that the applicant was not eligible for tax relief under the ITA granted.
H The question that arose, having regard to the submission of the parties, was whether the respondent lacked jurisdiction or statutory power to issue the additional notices.

Held (dismissing the application for leave with costs):

I **(1)** The applicant's argument that the respondent had withdrawn the ITA and had thereby contravened s. 28 of the Promotion of Investments Act 1986 was without merit. The respondent

was the taxing authority that had been entrusted by Parliament to levy income tax. Therefore the question whether a tax payer was eligible for some approved relief fell squarely within the province of the respondent to determine. The power of the respondent to determine the tax liability of the respondent under the Income Tax Act 1967 was not affected by the Promotion of Investments Act 1986. (para 9)

(1a) It was the argument of the respondent that the business activity of the applicant did not include processing poultry products in order to be eligible for tax relief under the ITA that was granted. By coming to that conclusion and disallowing the claim for tax relief, the respondent could not be said to have breached s. 28 of the Promotion of Investments Act 1986 or acted outside its jurisdiction. The respondent was the taxing authority that was charged by Parliament to determine the tax liability of tax payers. The duty of the respondent would necessarily include making a determination whether a tax payer had brought himself within the ambit of any exemption that had been granted. (para 10)

(2) The applicant had filed an appeal to the Special Commissioners of Income Tax. The question whether the applicant dealt with processed poultry products in order to bring their business activity within the ambit of ITA that was granted by the Minister was substantially a question of fact. Therefore this question was best dealt with in the appeal pending before the Special Commissioners of Income Tax (*Kerajaan Malaysia v. Dato' Ghani Gilong*). (paras 10 & 11)

Case(s) referred to:

Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC ***(refd)***

Dr Amir Hussein Baharuddin v. Universiti Sains Malaysia [1989] 1 LNS 76 HC ***(refd)***

Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Kerajaan Malaysia v. Dato' Ghani Gilong [1995] 3 CLJ 161 FC ***(refd)***

MAS Golden Boutique Sdn Bhd v. Md Zain Abu [1999] 3 CLJ 610 HC ***(refd)***

Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2008] 6 CLJ 235 CA ***(refd)***

Legislation referred to:

Promotion of Investments Act 1986, ss. 1, 27, 28, 29, 30, 31

Rules of the High Court 1980, O. 53 r. 3(1), (2), (3), (6)

A *For the applicant - Albert Tang; M/s Chew Jugah Wan Ullok & Co Advocates*
For the respondent - Abu Tarique Jamaluddin (Norsalwani Muhd Nor with him); FCs
For the Attorney-General - Mohd Taufik Mohamed Yusoff SFC; AG's Chambers

B *Reported by Suhainah Wahiduddin*

JUDGMENT

C **Ravinthran Paramaguru JC:**

[1] This is an application for leave to apply for an order of *certiorari* to quash the respondent's three Notices of Additional Assessment (Notis Taksiran Tambahan) dated 17 December 2009 D (Form JA) issued under the provisions of the Income Tax Act, 1967 in respect of the Year of Assessment 2004, 2005 and 2006 pursuant to O. 53 r. 3 of the Rules of the High Court 1980. The applicant also seeks to stay the operation of the said three notices of additional assessment.

E **Brief Facts**

[2] The applicant claims to be in the business of processing poultry or poultry products. The respondent is the taxing authority. The applicant had applied for and had obtained what is known as F the Investment Tax Allowance (ITA). Under s. 27 of the Promotion of Investments Act 1986, the Minister of International Trade and Industry (MITI) has the power to grant ITA for approved activities. The applicant obtained ITA for "processed poultry products". Under chapter 2 of the Act (ss. 27 - 31) the Minister G has the power to grant and withdraw ITA for approved activities. The preamble to the Act reads as follows:

> An Act to make provision for promoting by way of relief from income tax the establishment and development in Malaysia of H industrial, agricultural and other commercial enterprises, for the promotion of exports and for incidental and related purposes.

[3] The reason for the review of application is this. In 2008, the respondent carried out an audit exercise on the applicant's tax liability. They concluded that the applicant was not processing I poultry products such as burgers, sausages, etc. According to the respondent, the applicant was only dealing in chicken parts. The

applicant disputes the allegation of the respondent that they did not carry out the approved business activity of processing poultry products. The respondent determined that the applicant was not eligible for tax relief under the ITA in respect of its business activity in dealing with chicken parts. The applicant's argument is that the ITA was withdrawn by the respondent illegally. After the audit exercise was completed, the respondent imposed three additional assessments for the years 2004, 2005, 2006 in the sum of approximately RM2.15 million.

Application For Leave

[4] An application for judicial review requires leave of court under O. 53 r. 3(1) of the Rules of High Court 1980. An application for leave must be made *ex parte* to a judge in chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on (see O. 53 r. 3(2). In the instant case, the application, with the affidavit of Ling Ting Leng @ Ling Chong Seng who is the director of the applicant and the Statutory Statement were served on the Attorney General Chambers three days before the date of hearing as required by O. 53 r. 3(3). The application was also served on the respondent. The notices of assessment were received by the applicant on 5 January 2010. The application for judicial review was filed on 20 January 2010 which was well within the 40 days stipulated under O. 53 r. 3(6). The applicant has therefore complied with the pre-conditions for applying for judicial review under O. 53 r. 3. A judicial review application is a two stage process. The threshold requirement for a leave application is that the applicant must have an arguable case or a *prima facie* case (see *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33) before the court can consider the application in any depth. The purpose of the leave stage is to filter out frivolous and vexatious applications. Otherwise public authorities who are entrusted to perform statutory duties would be inundated with ill founded claims (see *MAS Golden Boutique Sdn Bhd v. Md Zain Abu* [1999] 3 CLJ 610). A judicial review leave application is essentially an *ex parte* application. In the instant case, it can be termed as an "opposed" *ex parte* application as the legal representative of the respondent chose to appear and object to the leave application. The respondent also filed two affidavits in opposition. Be that as it may, the threshold test

remains the same as in an unopposed *ex parte* application, ie, whether the applicant has an arguable case (see *Dr Amir Hussein Baharuddin v. Universiti Sains Malaysia* [1989] 1 LNS 76. The court must not treat the hearing as a full blown hearing on the merits.

Whether Threshold Test Satisfied?

[5] The argument of the respondent is that the judicial review application is frivolous because the applicant has an alternative remedy in respect of the issuance of the three impugned notices of assessment, ie, an appeal to the Special Commissioners of Income Tax. In fact, the applicant has actually appealed to the Special Commissioners of Income Tax but the appeal has yet to be fixed for hearing. Counsel for respondent cited the case of *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2008] 6 CLJ 235 where the Court of Appeal said as follows in considering the question whether leave should be granted for judicial review if an alternative appeal procedure was available to the applicant:

> The Supreme Court thus in *Jagdis Singh* had held that the discretion is still with the courts to act by way of judicial review, but where there is an appeal procedure available to the applicant, *certiorari* should not normally issue save in exceptional circumstances (see also *R v. Chief Constable of Merseyside Police ex parte Calveley* [1986] QB 424).
>
> [22] To repeat the guidelines of Jagdis Singh, the exceptional circumstances in the circumstances of this appeal required to be established by the appellant were that:
>
> i. the first respondent had a clear lack of jurisdiction; or
>
> ii. there was a blatant failure by the first respondent to perform some statutory duty; or
>
> iii. there was a serious breach of the principles of natural justice.

[6] In *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110, leave for judicial review was granted to quash additional notices of assessment at the High Court. The appeal on behalf of the taxing authority succeeded. Hashim Yeop Sani SCJ at the Supreme Court accepted the argument that it is not a rigid rule that judicial review will be refused whenever there is an alternative procedure available. However his Lordship said that:

> ... the discretion is still with the courts but where there is an appeal provision available to the applicant certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

[7] The question that has arisen, having regard to the submissions of the parties, is whether the respondent lacked jurisdiction or statutory power to issue the additional notices. If the applicant can show that the impugned notices were illegal, it would amount to exceptional circumstance that would justify granting of leave for judicial review notwithstanding the fact that the applicant has recourse to the alternative remedy of appeal of the Special Commissioners of Income Tax.

Investment Tax Allowance (ITA)

[8] The argument of the parties boils down to the issue whether the respondent had withdrawn the ITA allowance and issued the additional notices on that basis. From the affidavits, there is no dispute that the applicant was granted ITA by the Minister under s. 27 of the Promotion of Investments Act 1986 for the approved activity of "processed poultry products". The applicant however argued that by imposing additional assessments after the audit exercise, the respondent had in effect withdrawn the ITA. This is illegal according to counsel for applicant because only the Minister for MITI had the power to revoke the ITA under s. 28. The argument of counsel for respondent can be succinctly stated as follows. The respondent did not withdraw the ITA that was granted by the Minister for MITI. However, the audit exercised revealed that applicant was not carrying out the approved activity of processing poultry products such as "burgers, nuggets, fritters, fingers, meatballs, meatloaf, sausages and frankfurters". The applicant was only producing "whole chicken and chicken parts'. It was for this reason that the respondent determined the applicant was not eligible for tax relief under the ITA that was granted by the Minister for MITI.

Decision

[9] In my opinion, the argument of the applicant that the respondent had withdrawn the ITA and had thereby contravened s. 28 of the Promotion of Investments Act 1986 is without merit. The respondent is the taxing authority that has been entrusted by Parliament to levy income tax. Therefore the question whether a tax payer is eligible for some approved relief falls squarely within the

province of the respondent to determine. In fact, it can be said that Parliament was aware of any potential conflict between the Income Tax Act and the Promotion of Investments Act 1986. That is why in section 1 of the Promotion of Investments Act 1986, it is enacted as follows:

> 1(2) Subject to section 2, this Act shall be read and construed as one with the Income Tax Act 1967 [Act 53]

[10] To all intents and purposes, this means that the power of the respondent to determine the tax liability of the respondent under the Income Tax Act 1967 is not affected by the Promotion of Investments Act 1986. Putting it another way, the Minister for MITI may well have granted ITA to the applicant for some approved activity. However, that does not mean that the applicant is entitled to tax relief for some business activity that is not in the contemplation of the ITA that was granted. Whether that was what happened in this case, is within the purview of the respondent as the taxing authority to determine. In the instant case, the argument of the respondent is that the business activity of the applicant did not include processing poultry products in order to be eligible for tax relief under the ITA that was granted. By coming to that conclusion and disallowing the claim for tax relief, the respondent cannot be said to have breached s. 28 of the Promotion of Investments Act 1986 or acted outside its jurisdiction. This is because the respondent is the taxing authority that is charged by Parliament to determine the tax liability of tax payers. The duty of the respondent would necessarily include making a determination whether a tax payer had brought himself within the ambit of any exemption that has been granted. In the instant case, the applicant had filed an appeal to the Special Commissioners of Income Tax. The question whether the applicant dealt with processed poultry products in order to bring their business activity within the ambit of the ITA that was granted by the Minister is substantially a question of fact. Therefore this question is best dealt with in the appeal pending before the Special Commissioners of Income Tax (see *Kerajaan Malaysia v. Dato' Ghani Gilong* [1995] 3 CLJ 161).

[11] In conclusion, since the respondent did not lack jurisdiction to issue the impugned notices of assessment and no arguable case has been disclosed, I shall dismiss the application for leave with costs.